Heng Poh Kean v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-05(M)-442–12 OF 2016, W-05(M)-444–12 OF 2016 AND W-05(M)-446–12 OF 2016

ZAWAWI SALLEH, AHMADI ASNAWI AND KAMARDIN HASHIM JJCA

19 DECEMBER 2018

Criminal Law — Appeal — Appeal against conviction and sentence — Dangerous Drugs — Trafficking in dangerous drugs — Appellants convicted for offence of drug trafficking and sentenced to death — Whether informer assumed role of agent provocateur hence identity of informer lost its protection under law — Whether adverse inference should be invoked against prosecution for failure to call informer — Whether there was doubt in identity of drugs — Whether appellants' defence created reasonable doubt — Dangerous Drugs Act 1952 s 39B(1)(a)

Evidence — Adverse inference — Failure of prosecution to call witness — Whether informer assumed the role of agent provocateur hence identity of the informer lost its protection under the law — Whether adverse inference should be invoked against prosecution for failure to call informer — Evidence Act 1950 s 114(g)

The three appellants were charged and tried together at High Court of Kuala Lumpur for drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the end of the prosecution's case, the learned trial judge ruled that a prima facie case of direct trafficking by an overt act of selling as provided under s 2 of the Act had been proven against the appellants. The appellants gave sworn evidence and called two other witnesses. At the end of the defence's case, the learned trial judge found that the defence had failed to raise any reasonable doubt against the prosecution's case and the appellants were convicted as charged and accordingly sentenced to death. The present case was about an entrapment carried out by police agent provocateurs acting as drug buyers. The entrapment was conducted based entirely on information obtained by Detektif Lans Koperal Rosyaidi bin Anuar ('SP5') from his informer whose identity remained unknown during the trial. On 22 January 2014, SP5 was told by the informer to meet the seller, a Chinese man, in front of Kelab Connought at Taman Bukit Cheras, Kuala Lumpur. SP5 conveyed the information to his superior, SP4 who then instructed SP5 and Detektif Koperal Bahar bin Sukarman ('SP7') to act as the buyers and to proceed with the transaction according to the arrangement made by the informer. SP5 and

SP7 went to the meeting place in a white Toyota Estima car bearing registration No WXC 6662 driven by SP5. By the time they reached the place at about 8.30pm, SP4 and members of his team were already there, taking their ambush position. SP5 gave the ambush signal by flashing on the car's light and the ambush team led by SP4 sprang into action. The second appellant tried to flee the scene but was apprehended about 20 metres away from the car. Both the first appellant and the third appellant were detained while still inside the car. The plastic package containing a total of 5,000 ecstacy pills was seized from the first appellant. The ecstasy pills were analysed by the chemist, SP3 and was found to contain a total of 540.3g of 3, 4 — methylenedioxymethamphetamine (MDMA), a drug listed under the First Schedule of the Act, which formed the basis of the charge against all the appellants ('the said drugs'). The grounds of appeal which were essential to the court's decision were confined to: (a) the role of the informer; and (b) the doubt in the identity of the drugs. For the first ground of appeal, it was argued that the informer had assumed the role or mantle of an agent provocateur and that the identity of the informer lost its protection under the law. The second appellant argued that the failure on the part of the prosecution to call in informer to testify had seriously compromised the case, warranting adverse inference under s 114(g) of the Evidence Act 1950 ('the said section') to be invoked. For the second ground of appeal, the issue was raised on the discrepancies between the evidence of the raiding and investigating officer and the evidence of the chemist regarding the symbol appearing on 3,400 out of the total 5,000 ecstasy pills.

Held, allowing the appellants' appeal, setting aside the conviction and sentence by the trial court and acquitting and discharging the appellants:

(1) The learned trial judge had erred in finding that the informer had played no active role in the sale transaction. Though the informer was not present during the transaction, apparently the purchase price, the amount of drugs, the time and place of transaction were all determined by the informer and conveyed to SP5. The informer had played a significant role in the sale transaction and should be considered as a person who held 'the key to the unfolding of events without which there are gaps in the prosecution's case' and played the 'deciding factor in the sale transaction of the drugs'. The informer had assumed the mantle or role of agent provocateur and thus had become an essential witness for the unfolding of the full narrative of the prosecution's case without which there was a serious gap in the prosecution's case (see paras 19, 21 & 23).

(2) The prosecution shall not be adjudged to have deliberately made an attempt to suppress the evidence of the informer simply by its failure to call or offer the informer as a witness. Thus, the adverse presumption under s 114(g) of the Evidence Act 1950 shall not apply against the prosecution. Nevertheless, the failure by the prosecution to call the informer had created a material gap in the case and raised a reasonable

doubt as to whether the appellants had knowledge that they were consciously and deliberately participating in a sale transaction of drugs. Therefore, it could not be said that a prima facie case had been established against all the three appellants as charged and the defence should not have been called by the learned trial judge (see paras 24–25).

(3) There was no explanation provided by both SP4 and SP8 as to why they were discrepancies of those 3,500 pills. In the absence of a reasonable explanation, the learned judge could not simply brush it aside as immaterial and of no consequences. Under the circumstances, the onus was on the prosecution to offer cogent explanation to rectify the discrepancies and the failure to do so would raise a reasonable doubt in the identity of the drugs (see para 32).

[Bahasa Malaysia summary

Ketiga-tiga perayu dituduh dan dibicarakan bersesama di Mahkamah Tinggi Kuala Lumpur atas pengedaran dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Pada akhir kes pendakwaan, hakim bicara yang bijaksana telah memutuskan bahawa kes prima facie pengedaran secara langsung dengan menjual secara terang-terangan sebagaimana yang diperuntukkan di bawah s 2 Akta telah dibuktikan terhadap perayu. Perayu memberikan keterangan secara bersumpah dan memanggil dua lagi saksi lain. Pada akhir kes pembelaan, hakim bicara yang bijaksana telah mendapati bahawa pembelaan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan dan perayu dijatuhkan hukuman sebagaimana pendakwaan dan seterusnya dijatuhkan dihukum mati. Kes ini adalah berkait dengan perangkap yang dilakukan oleh penyamar sulit polis yang menyamar sebagai pembeli dadah. Perangkap itu dijalankan sepenuhnya berdasarkan maklumat yang diperoleh oleh Detektif Lans Koperal Rosyaidi bin Anuar ('SP5') dari pemberi maklumat yang identitinya tidak diketahui semasa perbicaraan. Pada 22 Januari 2014, SP5 diberitahu oleh pemberi maklumat untuk berjumpa dengan penjual, seorang lelaki Cina, di hadapan Kelab Connought di Taman Bukit Cheras, Kuala Lumpur. SP5 menyampaikan maklumat tersebut kepada pegawai atasan beliau SP4, yang kemudian mengarahkan SP5 dan Detektif Koperal Bahar bin Sukarman ('SP7') untuk menyamar sebagai pembeli dan menjalaskan urus niaga berdasarkan kepada aturan yang telah dibuat oleh pemberi maklumat. SP5 dan SP7 pergi ke tempat pertemuan dengan menaiki Toyota Estima putih bernombor pendaftaran kereta WXC 6662 yang dipandu oleh SP5. Pada waktu mereka sampai di tempat tersebut kira-kira jam 8.30 malam, SP4 dan ahli pasukannya sudah berada di sana, berada dalam posisi serangan hendap. SP5 memberikan isyarat kepada mereka dengan menyalakan lampu kereta dan pasukan yang diketuai oleh SP4 bertindak. Perayu kedua cuba melarikan diri tetapi ditangkap kira-kira 20 meter dari kereta. Kedua-dua perayu pertama dan perayu ketiga ditahan semasa masih berada di dalam kereta. Beg plastik yang mengandungi sejumlah 5,000 pil ekstasi telah

dirampas dari perayu pertama. Pil ekstasi dianalisis oleh ahli kimia, SP3 dan didapati mengandungi sejumlah 540.3g 3, 4 — methylenedioxymethamphetamine (MDMA), dadah yang disenaraikan di bawah Jadual Pertama Akta tersebut, yang membentuk asas pertuduhan terhadap semua perayu ('dadah tersebut'). Alasan rayuan yang penting terhadap keputusan mahkamah dihadkan kepada: (a) peranan pemberi maklumat; dan (b) keraguan identiti dadah. Untuk alasan rayuan pertama, ia telah dihujahkan bahawa pemberi maklumat telah mengambil alih peranan atau mantel seorang penyamar sulit dan bahawa identiti pemberi maklumat hilang perlindungannya di bawah undang-undang. Perayu kedua berpendapat bahawa kegagalan pihak pendakwaan untuk memanggil pemberi maklumat untuk memberi keterangan telah menjejaskan kes itu, dan mengguna pakai inferens memudaratkan di bawah s 114(g) Akta Keterangan 1950 ('seksyen tersebut'). Untuk alasan rayuan kedua, isu itu dibangkitkan mengenai perbezaan antara keterangan pegawai serbuan dan penyiasat dan keterangan ahli kimia mengenai simbol yang terdapat pada 3,400 daripada jumlah 5,000 pil ekstasi tersebut.

Diputuskan, membenarkan rayuan perayu, mengetepikan sabitan dan hukuman oleh mahkamah perbicaraan dan membebaskan dan melepaskan perayu:

(1) Hakim bicara yang bijaksana telah terkhilaf apabila mendapati pemberi maklumat tidak memainkan peranan aktif dalam transaksi pembelian. Walaupun pemberi maklumat tidak hadir semasa transaksi jual beli, harga belian, jumlah dadah, masa dan tempat transaksi kesemuanya telah ditentukan oleh pemberi maklumat dan disampaikan kepada SP5. Pemberi maklumat telah memainkan peranan penting dalam urus niaga jualan dan harus dianggap sebagai orang yang memegang 'kunci untuk merungkai peristiwa yang berlaku tanpa ada jurang dalam kes pendakwaan' dan memainkan 'faktor penentu dalam transaksi penjualan dadah'. Pemberi maklumat telah memakai mantel atau peranan sebagai penyamar sulit dan dengan itu menjadi saksi penting untuk merungkai naratif penuh kes pendakwaan tanpanya akan terdapat jurang yang serius dalam kes pendakwaan (lihat perenggan 19, 21 & 23).

(2) Pihak pendakwaan tidak boleh didakwa dengan sengaja membuat percubaan untuk menyembunyikan bukti pemberi maklumat hanya dengan kegagalannya untuk memanggil atau menawarkan pemberi maklumat sebagai saksi. Oleh itu, inferens memudaratkan di bawah s 114(g) Akta Keterangan 1950 tidak akan diguna pakai terhadap pendakwaan. Walau bagaimanapun, kegagalan pihak pendakwaan memanggil pemberi maklumat telah menyebabkan jurang penting dalam kes itu dan menimbulkan keraguan munasabah sama ada perayu mengetahui bahawa mereka secara sedar dan sengaja mengambil bahagian dalam urus niaga jualan dadah tersebut. Oleh itu, kes prima

facie terhadap ketiga-tiga perayu tidak boleh dinyatakan telah terbukti dan tidak seharusnya dipanggil untuk membela diri oleh hakim bicara (lihat perenggan 24–25).

(3) Tiada penjelasan yang diberikan oleh kedua-dua SP4 dan SP8 tentang mengapa terdapat percanggahan terhadap 3,500 pil tersebut. Dengan tiadanya penjelasan yang munasabah, hakim tidak boleh menolaknya sebagai tidak penting dan tidak mempunyai kesan. Dalam keadaan ini, beban adalah di pihak pendakwaan untuk memberi penjelasan untuk membetulkan percanggahan tersebut dan kegagalan berbuat demikian akan menimbulkan keraguan munasabah dalam identiti dadah tersebut (lihat perenggan 32).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.
For cases on failure of prosecution to call witness, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 413–433.

Cases referred to

Ti Chuee Hiang v PP [1995] 2 MLJ 433; [1995] 3 CLJ 1, FC (refd)
Wan Yurillhami bin Wan Yaacob & Anor v PP [2010] 1 MLJ 749; [2010] 1 CLJ 17, FC (refd)
Zaifull bin Muhammad v PP and another appeal [2013] 2 MLJ 348; [2013] 2 CLJ 383, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 39B(1)(a), 40, First Schedule
Evidence Act 1950 s 114(g)

Appeal from: Criminal Trial No 45A-31–05 of 2014 (High Court, Kuala Lumpur)

Kitson Foong (Chew Jee San and Poh Yi Tying with him) (Kit & Assoc) for the first appellant.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the second appellant.
Hazman bin Ahmad (Omar Ismail Hazman & Co) for the third appellant.
Mohd Zain bin Ibrahim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmadi Asnawi JCA:

[1] The three appellants were charged and tried together at the High Court of Kuala Lumpur for drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The charge against them read as follows:

Bahawa kamu bersama-sama pada 22.1.2014 jam lebih kurang 9.30 malam di hadapan Kelab Connought, Jalan 9, Taman Bukit Cheras, di dalam daerah Cheras di dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya iaitu 540.3 gram dadah 3, 4 — Methylenedioxymethamphetamine (MDMA). Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama serta di baca bersama seksyen 34 Kanun Keseksaan.

[2] At the end of the prosecution's case, the learned trial judge ruled that a prima facie case of direct trafficking by an overt act of 'selling' as provided under s 2 of the DDA had been proven against the appellants.

[3] The appellants gave sworn evidence and called two other witnesses. At the end of the defence's case, the learned trial judge found that the defence had failed to raise any reasonable doubt against the prosecution's case and thus, the appellants were convicted as charged and accordingly sentenced to death.

[4] Their appeals came up for hearing before us on 18 January 2018. We allowed their appeals, set aside the convictions and sentences handed down by the learned trial judge and consequently acquitted all the three appellants of the charge.

[5] For the purpose of this judgment, we will only narrate the facts and issues considered to be relevant and essential to our decision and will also refer to the appellants as they were referred to before the High Court.

THE CASE FOR THE PROSECUTION

[6] This is a case of an entrapment carried out by police agent provocateurs acting as drug buyers. The entrapment was conducted based entirely on information obtained by SP5 (Detektif Lans Koperal Rosyaidi bin Anuar) from his informer whose identity remained unknown during the trial. On 22 January 2014, SP5 was informed by the informer that a drug transaction involving the purchase of 5,000 'ecstasy pills' at the price RM87,500 had been arranged. SP5 was told by the informer to meet the seller, a Chinese man, in front of Kelab Connought at Taman Bukit Cheras, Kuala Lumpur. SP5 conveyed the information to his superior, SP4 (Asisten Superintenden Polis Mohd Ashril bin Md Johar), who then instructed SP5 and SP7 (Detektif Koperal Bahar bin Sukarman) to act as the buyers and to proceed with the transaction according to the arrangement made by the informer.

[7] SP5 and SP7 went to the meeting place in a white Toyota Estima car bearing registration No WXC 6662 driven by SP5. By the time they reached the place at about 8.30pm, SP4 and members of his team were already there,

taking their ambush position. After waiting in the car for about 15 minutes, OKT3 (Ooi Teck Voon/the third appellant) came and entered the car. He requested to see the money but SP5 demanded to see the 'ecstasy pills' first. OKT3 left the car and came back later with OKT1 (Heng Poh Kean/the first appellant). Both of them then entered the car. OKT1 sat at the front passenger seat besides SP5 and OKT3 sat at the back with SP7. OKT1 thereafter demanded to see the money. SP5 duly gave him the money. OKT1 counted the money and made a phone call after the counting of the money was completed. OKT2 (Ng Seng Siong/the second appellant) came to the car not long after OKT1 made the phone call, carrying with him a plastic package. He passed the package to OKT3 who in turn passed it to OKT1. OKT1 opened the plastic package, revealing the 'ecstasy pills'. Thereupon, SP5 gave the ambush signal by flashing on the car's light and the ambush team led by SP4 sprang into action. OKT2 tried to flee the scene but was apprehended about 20 meters away from the car. Meanwhile, both OKT 1 and OKT3 were detained while still inside the car. The plastic package containing a total of 5000 'ecstasy pills' was seized from OKT1.

[8] The 'ecstasy pills' were analysed by the chemist, SP3 (Suhana bt Ismail), and was found to contain a total of 540.3g of 3, 4 — methylenedioxymethamphetamine (MDMA), a drug listed under the First Schedule of the DDA, which form the basis of the charge against all the appellants ('the said drugs').

THE APPEALS

[9] There were several grounds of appeal raised by learned counsel for the appellants through their respective petition of appeals and written submissions, including the failure by the learned trial judge to make a specific finding of possession; discrepancies in the identification of the said drugs; the role played by each appellants during the transaction; and the failure by the learned trial judge to appreciate the defence. At the end of the day, we opined that the grounds, essential to our decision, were confined to only the following:

(a) role of the informer; and

(b) doubt in the identity of the drugs.

ROLE OF THE INFORMER

[10] The law relating to an informer is settled. Under s 40 of the DDA, the identity of an informer is protected from disclosure in any legal proceedings, which necessarily includes protection from being identified and called to testify in a criminal trial.

[11] However, it was submitted before us by learned counsel for the second appellant and adopted by counsels for the first and third appellants, that the informer in this case had assumed the role or mantle of an agent provocateur. Therefore, it was argued that the identity of the informer lost its protection under the law. The informer in fact has metamorphosed into an essential witness for the prosecution and the failure on the part of the prosecution to call the informer to testify had seriously compromised its case, warranting the adverse inference under s 114 illustration (g) of the Evidence Act 1950, against the prosecution to be invoked.

[12] In support of his submission, learned counsel relied on the judgment of the Federal Court in *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749; [2010] 1 CLJ 17 where it was held that:

> [16] From the decision of the above cited cases, the position in law in relation to ss 40 and 40A of the Act is well settled and clear. The informer is protected from giving evidence whilst an agent provocateur is not protected. In other words, if a person is only an informer, the prosecution is not required to call him as a witness or offering him to the defence. An informer is protected under s 40 of the Act. On the other hand if a person is an agent provocateur, he is required to give evidence in court as a prosecution witness and if he is not called he has to be offered and made available to the defence. Failure to comply with this requirement will attract the application of adverse inference under s 114(g) of the Evidence Act against the prosecution's case.

[13] The guiding principle regarding the issue can further be found in the Federal Court case of *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; [1995] 3 CLJ 1, in which it was laid down as follows:

> Having said that, it is in our view clear law, that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see eg *Adel Muhammed el Dabbah v A-G (Palestine)* [1994] AC 156 at pp 167–9) the most basic limitation upon prosecutorial discretion in the presentation of a case, is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation which is nothing less than a statutory duty — the accused must be acquitted.
>
> In the present case, the informer, having regard to his role, was not a mere informer, but had assumed the mantle of an agent provocateur, for it was he, who had put the appellant in touch with the undercover agent Lian. Indeed, he was the active instrument without whose intervention, the appellant might never have been even arrested. His identity was no longer a secret and thus he had lost the protection from disclosure of identity normally accorded to informers under s 40 of the Act.
>
> In these circumstances, he came within the category of witnesses, described by Lord Roche in *Seneviratne*, as 'witnesses essential to the unfolding of the narratives on which the prosecution case is based'. The same might be said of the informer's friend.

Yet, neither the so called informer nor his friend, whose testimony would have been essential to the unfolding of the narrative on which the prosecution case was based, was called by the prosecution or even made available to the defence to be called as defence witnesses nor any explanation vouchsafed to the trial judge for these glaring omissions.

We hasten to add, that in a case such as the present, where it was never suggested by the prosecution that either of these individuals was not capable of belief, it would not have sufficed for the prosecution to have merely made them available to the defence to be called as defence witnesses as such a course would have put the defence to the disadvantage of not having been able to cross-examine them on any point on which they might support the prosecution case.

In our view, having regard to the circumstances of the present case, it was the obligation of the prosecution to call and examine these individuals as their witnesses or, at least, to have offered them for cross-examination by the defence or in default to have explained why they were unable or unwilling to call them as the case may be. We say so because without their testimony there was a gap in the narrative of the prosecution case. Moreover, there was no suggestion that their testimony would have been obviously hostile to the prosecution or otherwise unreliable, in which case, 'the prosecutor will ensure that the accused is given the opportunity to call the witness (per the High Court of Australia in *Richardson*).

[14] The pertinent question thus is whether the informer in this case had in fact assumed the mantle of an agent provocateur and hence became 'witnesses essential to the unfolding of the narratives on which the prosecution case is based'?

[15] It is thus crucial to scrutinise the evidence regarding the involvement of the informer in the whole transaction, which we thought the learned trial judge had failed to do. SP5 in cross-examination had given evidence as follows (at p 95, appeal record, Vol 2):

Q: Tadi kamu kata, kamu tidak ada nombor telefon mana-mana OKT. Kamu kata Ah Man yang beritahu. Saya cadangkan sebenarnya bukan Man yang beritahu bawa wang RM87,500.00 untuk 5000 pil ini tetapi sumber kamu yang beritahu kamu?

A: Setuju.

Q: Setuju dengan saya sebelum tangkapan kamu hanya berurusan dengan sumber kamu sahaja?

A: Benar.

Q: Setuju dengan saya pada hari kejadian kamu datang untuk ambil barang dan bayar sahaja?

A: Benar.

[16] Further, the investigating officer, SP8 (Insp Kumbat ak Tan), in cross-examination, had testified as follows (at p 163, appeal record, Vol 2):

Q: Setuju dengan saya, rekod-rekod panggilan keluar masuk ini adalah penting dan membantu siasatan kamu?

A: Saya kurang setuju.

Q: Yang mana kurang setuju? Boleh terangkan?

A: Sebab daripada siasatan saya ketiga-tiga OKT tidak pernah berhubung secara direct dengan kedua-dua AP.

[17] However, the learned trial judge found that SP5's informer did not play an active role and was not at the scene of the crime and the said informer was thus protected under s 40 of the DDA 1952. Hence, the failure to call the said informer is no ground to invoke the adverse presumption under s 114 illustration (g) of the Evidence Act 1950. The learned trial judge stated, at pp 40–41, appeal record, Vol 1:

[58] Selain itu, peguam OKT2 berhujah bahawa kegagalan pihak pendakwaan memanggil 'sumber' SP5 untuk memberi keterangan telah membangkitkan inferen yang bertentangan di bawah s 114(g) ini.

[59] Undang-undang adalah jelas bahawa sama ada seseorang itu adalah seorang 'sumber' atau ajen perangkap adalah bergantung kepada fakta sesuatu kes. Ini dijelaskan dalam kes *Public Prosecutor v Mansor Md Rashid & Anor* di ms 253 seperti berikut:

> Before us it was submitted for the respondents that Cholar as an informer had turned into as agent provocateur. *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 *was cited in support.*
>
> *The Act does not define 'informer' and 'agent provocateur'. But the distinction is recognised. (See s 40 and 40A of the Act).*
>
> *In Munusamy v Public Prosecutor* [1987] 1 MLJ 492 *Mohd Azmi SCJ in delivering the judgment of the Court opined that 'whether a person is an informer or has become as active agent provocateur would depend on the facts of each particular case'.*

[60] Kembali kepada fakta kes ini, sumber kepada SP5 tidak memainkan peranan aktif dan tidak berada di tempat kejadian. Oleh itu perlindungan kepada 'sumber' di bawah s 40 ADB 1952 adalah terpakai. (Emphasis added.)

[61] Sehubungan itu juga, tindakan pihak pendakwaan tidak memanggil 'sumber' tersebut untuk memberi keterangan tidak dibangkitkan inferen yang bertentangan kepada kes pendakwaan di bawah s 114(g).

[18] Learned counsel for the second appellant submitted that the learned trial judge, in making the aforesaid finding that the informer did not play an active role based upon the fact that the informer was not present during the sale transaction, had committed a grave error by taking a too simplistic approach of the issue.

[19] With due respect, we agreed with learned counsel that the learned trial judge had erred in finding that the informer had played no active role in the sale transaction. Though the informer was not present during the transaction, apparently, the purchase price, the amount of drugs, the time and place of the transaction, were all determined by the informer and conveyed to SP5. Further, SP8 confirmed that there was no direct communication in any form between SP5 or SP7 and any of the appellants prior to the transaction.

[20] The Federal Court in *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* made a reference to the case of *Ti Chuee Hiang v Public Prosecutor* and held that:

> [20] As regards the case of *Ti Chuee Hiang v Public Prosecutor* cited by the appellants to support their case that Seman is an agent provocateur, it can be discerned from the judgment of the case that before an informer becomes an agent provocateur and no longer enjoy the protection of s 40 of the Act the following conditions must be satisfied:
>
> (a) he holds the key to the unfolding of events, without which there are gaps in the prosecution's case; and
>
> (b) his role is the deciding factor in the sale transaction of the drugs.

[21] Based on the facts and circumstances of this case, we were of the considered view that the informer had played a significant role in the sale transaction and should be considered as a person who held 'the key to the unfolding of events, without which there are gaps in the prosecution's case' and played the 'deciding factor in the sale transaction of the drugs'.

[22] Clearly, the evidence revealed that it was the informer who had actually communicated with the seller and determined the price and amount of the 'estacy pills' and the time and place of the sale transaction that is to take place and had it conveyed to SP5. SP5 then conveyed the information to SP4 who made the decision to proceed with the sale transaction that finally resulted in the arrest of the appellants. SP8 confirmed that there was never a direct communication between SP5 and SP7 with any of the appellants.

[23] In such circumstances, we were strongly of the view that the informer had assumed the mantle or role of an agent provocateur and thus had become an essential witness for the unfolding of the full narrative of the prosecution's case, without which, there was a serious gap in the prosecution's case.

[24] As regards to the application of an adverse presumption under s 114 illustration (g) of the Evidence Act 1950, we were of the view that based on the facts and evidence, the prosecution shall not be adjudged to have deliberately made an attempt to suppress the evidence of the informer simply by its failure

to call or offer the informer as a witness. Thus, the adverse presumption under the said section shall not apply against the prosecution.

[25] Nevertheless, the failure by the prosecution to call the informer had created a material gap in its case and consequently, raised a reasonable doubt as to whether the appellants had knowledge that they were consciously and deliberately participating in a sale transaction of drugs, since all the matters and information regarding the sale transaction were obtained by SP5 from the informer and there was never any direct communication between SP5 and the appellants. Therefore, it could not be said that a prima facie case had been established against all the three appellants as charged and thus, the defence should not have been called by the learned trial judge.

DOUBT IN THE IDENTITY OF THE DRUGS

[26] This issue was raised mainly in the light of the discrepancies between the evidence of the raiding and investigating officer ('SP4 and SP8') and the evidence of the chemist ('SP3') regarding the symbol appearing on 3,500 out of the total of 5,000 'ecstasy pills'.

[27] The evidence of SP4 and SP8 showed that the 'ecstasy pills' seized at the crime scene by SP4 and later handed over to SP8 were in the following descriptions:

(a) 35 plastic packets, each containing 100 pink-coloured pills bearing '$' symbol;

(b) one plastic packet containing 1,000 yellow-coloured pills; and

(c) one plastic packet containing 500 yellow-coloured pills.

[28] However, the evidence of SP3 showed that the 'ecstasy pills' received by her from SP8 were described as follows:

(a) 20 plastic packets, each containing 100 pink-coloured pills bearing '$' symbol;

(b) 15 plastic packets, each containing 100 pink-coloured pills bearing 'Crown' symbol;

(c) one plastic packet containing 1000 yellow-coloured pills; and

(d) one plastic packet containing 500 yellow-coloured pills.

[29] Apparently, the evidence of SP4 and SP8 showed that 3,500 of the pink-colored pills had '$' symbol embossed on them whereas the evidence of SP3 showed that out of the 3,500 pink-colored pills, 1,500 of them had a 'Crown' symbol on them and not a '$' symbol.

[30] In his grounds of judgment at pp 41–42, appeal record, Vol 1, the learned trial judge had considered the issue in the following terms:

> Isu identiti barang kes
>
> [62] Selain itu, pihak pembelaan juga mempertikaikan identiti barang kes dalam kes ini antara lain kerana terdapat perbezaan jumlah pil-pil yang berlogo 'S' menurut borang serah menyerah (P33) berbanding dengan laporan kimia (P27) yang mencatitkan juga pil-pil yang berlogo 'crown' yang tidak dicatitkan dalam 'P33'.
>
> [63] Berhubung perkara ini, berdasarkan P33, jumlah pil yang terlibat adalah sebanyak 5000 biji. Laporan Kimia (P27) juga mencatitkan jumlah pil adalah 5,000 biji. SP4 yang merampas barang kes mengecam barang kes melalui penandaan dan tandatangan SP4. Rantaian keterangan berhubung dadah ini juga tidak terputus. Hanya kerana perbezaan jumlah pil bertanda 'S' dan 'crown' sahaja tidak menunjukkan ianya bukan dadah yang dirampas di tempat kejadian. (emphasis added) Berdasarkan huraian fakta di atas, saya dapati dadah yang dianalisa oleh ahli kimia iaitu SP3 adalah dadah yang sama yang dirampas di tempat kejadian pada 22.1.2014 berkenaan dan barang kes yang sama dibawa ke Mahkamah untuk perbicaraan. Selain itu rantaian keterangan berhubung dadah yang dirampas tersebut tidak terputus.

[31] In response of the said findings, learned counsel cited the Federal Court case of *Zaifull bin Muhammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348; [2013] 2 CLJ 383, where the issue of the discrepancies in the description of the drugs in issue was determined as follows:

> [33] In the present case, there are two material discrepancies that is as to the number of 'ketulan' and as to the gross weight of the cannabis. Both these discrepancies were never explained by the prosecution, save to say that the charge referred to by learned counsel was the original charge, and the charge was later amended to read as trafficking in 799.4g of cannabis. It was further contended by the prosecution that since the amended charge is based on the net weight, therefore, any discrepancy in the gross weight is immaterial.
>
> [34] The prosecution further argued that based on the evidence before the court, there is no break in the chain of the evidence with regard to the drug exhibit. The prosecution submitted that all the relevant witnesses called by the prosecution had positively identified the drug exhibit based on the contemporaneous markings made by the witnesses. On that premise, the prosecution contended that the discrepancies do not create any doubt in the identity of the drug exhibit.
>
> [35] With respect, we could not agree with the prosecution on this issue. We are of the view that, in the circumstance of this case, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies left unexplained, this created a reasonable doubt as to the identity of the drug exhibit. In the circumstance, the defence should not have been called at the close of the prosecution case.

[32] Apparently in the present case, there was no explanation provided by both SP4 and SP8 as to why there were discrepancies in the identification of those 3,500 pills. It involved a big amount of pills that were wrongly identified and thus, it is our view that in the absence of a reasonable explanation, the learned trial judge could not simply brush it aside as immaterial and of no consequence. Under the circumstances, the onus is on the prosecution to offer cogent explanation to rectify the discrepancies and the failure to do so would raise a reasonable doubt in the identity of the drugs.

THE CONCLUSION

[33] Based on the reasons as stated above, we were of the view that the prosecution had failed to prove a prima facie case against all the three appellants and their defence should not have been called. We, therefore, allowed the appeal and set aside the convictions and sentences handed down by the learned trial judge. We further ordered that all the three appellants shall be acquitted forthwith and discharged of the charge against them.

Appellants' appeal allowed; conviction and sentences by trial court set aside; appellants acquitted and discharged.

Reported by Mohd Kamarul Anwar